Supreme Court of the United States

OCTOBER Term, 1940

No. 333

Petition For Certiorari

J. W. KOHN, M. S. KOHN and
J. W. KOHN, Administrator
of the Estate of CARRIE KOHN,

Petitioners

vs.

THE HONORABLE MAC SWINFORD,
Judge of the United States
District Court for the Eastern
District of Kentucky, and the
HONORABLE XEN HICKS, Presiding
Judge of the Circuit Court of
Appeals in and for the Sixth
Circuit, and the respective Courts:

Respondents.

In the case of : J. W. Kohn, et al, vs. J. W. Martin, et al.

HARVEY H. SMITH,
Attorney for Petitioners,
Covington, Ky., and
Cincinnati, Ohio.

(This separate petition of the Petitioners joins in the application of the defendant, Central Distributing Company, Inc., for Writ of Certiorari to the Respondents, represented by Frank M. Dailey, Frankfort, Kentucky).

For Defendants and Petitioners
Brief at Page 11

10 Collection of penalties ceased under repeal of the Act of 1934. (Paragraph 12, pages 8 and 9)

11 Act of April 30, 1936 and 1938 void. (Unconstitutional.) (Paragraph 13, page 9)

12 Refusal of the United States District Court to examine jurisdiction or hear a jury trial. (Paragraph 14, page 9)

13 Denial of due process, denial of appeal, denial of mandamus, refusal to docket and try the issues, denial of due process and equal protection of the laws; refusal to strike the name of J. W. Martin, and attorneys, resigned officer, denial of due process. (Paragraph 15, page 10)

14 Denial of jury trial under Judicial Code, Section 773, on controverted issues. Denial of equal protection of the laws of Kentucky. Section 20, 509 Code. (Paragraph 16, page 11)

15 Double collection of import taxes—contrary Kentucky Law and Article 1, Section 8. (Paragraph 16, page 11)

BRIEF

Authorities on page 12, section 238, concerning writ of Certiorari. On pages 12, 13, 14, 15, and 16 are the authorities showing that the judgment of April 16, 1938, is void as to the merits, and merits must be tried.

On page 17 are citations showing the right of a single taxpayer to collect either as assignor or assignee or both or one for all.

Page 18, Prayer.

Substitution of revivorship. If none in six months, judgment void. United States Rule 25. Not made within twelve months, judgment void; if entered without revivorship, void. (Ky.)

Asher vs. Fordson Coal Co., 249 Ky. 498.

Fordson Coal Co. vs. Jackson, 7 Fed. (2) 117.

Attorneys of record could not appear—not attorneys for auditor. Sec. 10, Act of 1934. 145—112 Ky. Statutes.

SECTION OF THE JUDICIAL CODE U. S. A.

Judicial Code, 238.
Annotated, 345.
Judicial Code, 237.
Annotated, 344.—5.
Judicial Code, 57.
Annotated, 118.

STATEMENT OF JURISDICTION AND INDEX TO POINTS IN THE PETITION

1 The Three Court judgment of dismissal rendered at Louisville April 16, 1938, is void for the following reasons:

(a) The court could render no judgment out of the Eastern District.

(b) The court decided that petitioners had an adequate remedy at law. (Single Judge denied it).

(c) This action had precedence of the state suit.

(d) Must be rendered by single Judge.

(Paragraph 1, page 1 and 2)

2 United State District Court for the Eastern District had no jurisdiction.

(a) No service on the Central Distributing Company, Inc.

(b) No service on the trustee.

(c) Trustee not a party to the action.

(d) Franklin Circuit Court was without jurisdiction. (prison penalty).

(Paragraph 2, page 3)

3 (a) State could not attach assets in the hands of a trustee under Kentucky law.

(b) Summons issued to service agent not served.

(c) Import taxes violate Article 1, Section 8, 14th Amendment, and Article 3, of the Bill of Rights of Kentucky.

(d) Mortgage foreclosure of $3000 or more must be adjudicated or there is a denial of due process and an impairing of contract rights.

(Paragraph 3, page 4)

4 (a) The consumers' tax attempted to be collected violates sections 171, 172, and 174 of the Constitution of Kentucky, and Article 1, Section 8, of the United States Constitution

(b) State auditor must be a party to the action. (145 Kentucky Statute).

(c) Foreclosure the main action—injunction plaint incidental.

5 The tax act of 1936—April 30—controlled tax and controlled parties to the action, which was the auditor, not the revenue commissioner (see 112—1—5, Kentucky Statutes). (Sec 10, 1934 Acts).

(Paragraph 5, page 5)

6 Denial of Jury—USCA 780. Rule 25.—Jurisdictional in Campbell County, not Franklin County.

(Paragraph 6, page 6).

7 Motion for judgment April 11, 1938.

(Paragraph 8, page 7)

8 Judgment at Louisville void.

(Paragraph 9, pages 7 and 8)

9 No findings of fact.

(Paragraph 11, page 8)

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In the case of : J. W. Kohn, et al, vs. J. W. Martin, et al.

To the Honorables; the Judges of the Supreme Court of the United States:

Come now the petitioners and for grounds supporting their application for writ of Certiorari, allege and say:

1. That heretofore this action was appealed to the Supreme Court of the United States, and is case No. 177, entitled as above, except the defendants therein named were the Commonwealth of Kentucky and James W. Martin, Revenue Commissioner of Kentucky on his relation as said official to said

State. This appeal was from a judgment of the three judge court assembled at Louisville, in the Western District of Kentucky, on April 16, 1938. The Honorable Mac Swinford, Presiding Judge of the Eastern District insists and decided on the 27th day of February, 1940, that the judgment denying injunction determined the entire merits of the case, and that the three judges who sat at said time had the jurisdictional right to determine all of the issues, when as a matter of fact your petitioners contend that the three judge court judgment was void because the court could not sit in the Western District of Kentucky, in a cause originating and pending in the Eastern District. That the judgment dismissing can only be signed by a single judge, and not by the three judges; under Section 266, the three judges could merely deny the injunction and refer the case back to the single judge. The single judge never entered the motion for judgment dismissing the cause of action. (Revised Statutes, U. S., Section 581-case U. S. 14 Fed. (2) 510 - In Re Briggs, 15-88 Fed. (2). Case vs. U.S. Bland vs. Kenamer - 6(2) F. 130

This District Court entered a degree that the plaintiffs, J. W. Kohn, et al, who were seeking to foreclose a mortgage on assets in Campbell County, Kentucky, and to recover otherwise judgment for an unsecured debt for $22,000, were foreclosed in trying the issue thereafter in the District Court by the said judgment, which found that they had an adequate remedy at law in said court or in the State court, whichever court had first secured judisdiction of the subject matter. Your petitioners claim that by filing their suit on the 26th day of February, 1938, and having served James W. Martin and the Commonwealth of Kentucky on or about said date, that this

cause of action had precedence over a cause of action brought in the State against Central Distributing Company, Inc., wherein the Commonwealth of Kentucky, by James W. Martin, sought to seize the entire assets of said corporation, which suit was filed on the 16th day of February, 1938, in the Franklin Circuit Court of Franklin County, Kentucky.

2. Your petitioners say and allege that no service was ever had on Central Distributing Co., Inc., because no officer of the corporation was served, and the service agent was not served. This is an absolute defense under the State laws of Kentucky, which bind this court under the decisions of Erie Railroad Co. vs. Thompson. The second reason why the Franklin Circuit Court had no jurisdiction was because Harry Bayer had been appointed trustee or bailee by agreement between Central Distributing Co., Inc., and your petitioners, and it is the law of Kentucky, and was then, that no attachment can be run or issued against property in the hands of a trustee or bailee. This is, in Kentucky, regarded as a foreclosure proceeding, and has the same force and effect as a receiver. The third reason why said court had no jurisdiction was because the Constitution of Kentucky gives the Franklin Circuit Court only such jurisdiction as it had at the time the Constitution was adopted in 1891. This jurisdiction, as repeatedly decided before and since, was limited entirely to civil penalties under a civil penalty statute for the collection of moneys due on bonds of public officials; and that therefore, this court had no jurisdiction of the subject matter. Another reason was that the property was under mortgage which was duly recorded at the time the attachment was sued out and a court can obtain no jurisdiction of such

an action until the mortgagee has been made a party to the action, although in the month of May, this was attempted by the defendant, James W. Martin. No proper service was ever had.

3. But your petitioners appeared in the Franklin Circuit Court and challenged by special demurrer and motion to quash the jurisdiction of said court. These motions were denied out of order and without permission to present any proof by the said Judge presiding in said court. That your petitioners are citizens of Ohio, and were seeking to foreclose a mortgage in excess of $3000.00, and that the action of the Franklin Circuit Court and James W. Martin, an administrative officer of the Commonwealth of Kentucky, amounted to the destruction and to the impairing of the obligative contract between the Central Distributing Company, Inc., and your petitioners, and that therefore, such action and such imposition was in violation of the 14th Amendment, and that the taxes sought to be collected were partly import taxes, which it is claimed the State, under a 1936 satute, had a right to collect. Your petitioners contest this right by saying that the statute, is void because it requires the payment of an import tax before movement of the merchandise into the State of Kentucky, and that the same is prohibited also by the Constitution of Kentucky in Article 3 of its Bill of Rights, which prohibits the levying of the tax on property not within the territorial limits of the state. The Legislature has no power and no authority to amend the Bill of Rights of the Constitution of Kentucky, and the said provision remains a self-executing law of the Commonwealth.

4. That at the same time a part of the taxes

attempted to be collected from the said Central Distributing Co., Inc., was a violation of Sections 171, 172 and 174 of the Constitution of Kentucky, which provided that taxes must be levied on the *fair cash value* of the property, and that these taxes as levied must be uniform under a proper classification, and that they must not be discriminating, and that they must not be confiscatory, and that the tax as levid must not be a second tax of the same kind, levied on the same property. That this tax attempted to be collected was a tax collected the second time as an excise import tax. That, as levied, it was a violation of Article 1, Section 8, of the Constitution of the United States, and of Section 3 of the Bill of Rights of Kentucky. That to deprive your petitioners of their property by a lack of due process procedure in the State of Kentucky was to present a Federal Constitutional question to this court for its determination in addition to impairing their contract.

THE STATE AUDITOR WAS ONLY PARTY WHO COULD SUE. (Sec 20) Act 1934

5. That at the time said attachment was run on the assets of the Central Distributing Co., Inc., as alleged, the title to the property had passed to the Trustee and your petitioners, and the defendant, Central Distributing Co., Inc., had no assets on which a levy could be made, and that this fact must be determined, and the fact that jurisdiction of the seizure by the Franklin Circuit Court must be determined by the United States District Court for the Eastern District of Kentucky, which it refused to do; and that it had constructive jurisdiction and control of the res, which was the property of your petitioners, and not the Franklin Circuit Court, because of the priority of the Federal suit as between J. W. Kohn, et al, and J. W. Martin, official of the State of Ken-

tucky, and that said Trustee was never a party to the action.

6. That the laws of Kentucky in many respects are controlling in this litigation, and that such laws provide that a trial by jury, when demanded, makes void any judgment rendered by a court unless, specifically, in writing, a jury is waived. That the Franklin Circuit Court denied the right of trial by jury on the common law issues of fact, which divested it of jurisdiction, if it ever had such jurisdiction. That also there was no party plaintiff at the time of the trial of that action because there had been no revivor under the laws of Kentucky, which are the same as the laws governing the United States District Court, except that in Kentucky the time to revive, is within twelve months, and it is six months in the Federal courts. U. S. C. A., Section 780, Rule 25. That furthermore, under the laws of Kentucky, a suit must be filed or brought in the county where the place of business of the corporation is located, and the business was located in Campbell County, and furthermore, the alleged offense committed by the Central Distributing Co., Inc., if any, was for the non-payment of these taxes, both the consumers' taxes and import taxes. The Consumer's tax of $1.04 per gallon is imposed, not as a matter of right, but is imposed on the condition and when sales are made without the payment of the tax, and thus the offense would be committed where the sales were made and criminal, and the obligation arises where the sales are made. These sales were made, if any, in Campbell County, and these sales must be proven, and therefore become a Common Law issue of debt to the State only when such sales are made.

8. But the Honorable Mac Swinford, United States District Court Judge denied a hearing or an examination of the facts involved in this entire service, on said assets, inclusive of the determination of the jurisdiction of the court on any of the grounds alleged. A motion was made by the Central Distributing Co., Inc., defendant, for a hearing on these issues and for judgment as the record stood at the time of making this motion. The court refused to pass upon this motion, or consider it.

A motion was made by your petitioners for judgment, joined by Henry J. Cook, Attorney for the Central Distributing Co., Inc., on the 11th day of April, 1938, and sworn affidavits were introduced in support of said motion, but the Court did not render judgment on this motion because the Court had declined to sustain the motion to transfer the cause to three judges. On the 12th day of April, 1938, the Circuit Court of Appeals for the Sixth Circuit, reversed it, and on the 12th day of April, 1938, the District Judge ordered the cause submitted to a three judge court in the city of Louisville, state of Kentucky, *outside of the District.*

9. That it is the contention, and it is alleged by your petitioners that the judgment at Louisville, Kentucky, was void because it was outside of the District, fixed by Federal statute which prescribes where district courts may sit and where judgments may be rendered; and there is no provision in said statute that such a judgment may be rendered outside of the District, which sitting was objected to by your petitioners, and which exception to said judgment rendered at said sitting was duly made by your petitioners, and is shown in the Exhibits attached to the petition of the Central Distributing Co., Inc.,

10. That, as decided in said judgment of April 16, 1938, at Louisville, your petitioners had an adequate remedy at law. Under the authority of this court, it was their duty to remain in the United States District Court and move for trial of these issues, in respect to the foreclosure of their mortgage; in respect to the recovery of their taxes, it being provided in the decision, it was under Section 12 of the 1934 Act, which Section provided *that such an action might be brought in the United States District Court for the Eastern District of Kentucky.* That on this finding, this Honorable District Court had jurisdiction, and it had exclusive jurisdiction, because the action was brought prior to the action in the State Court *in respect to your petitioners.*

11. That a judgment is void in Kentucky unless supported by findings of fact, and under Federal rules 52 and 70½, but the Court here made no findings, though demand was made by plaintiffs, and the Judge refused filing of plaintiffs' motion for findings.

12. That pending this litigation on March 7, 1939, the Legislature repealed the Act of 1934, which created the Central Distributing Co., Inc., as a licensee, which was invalid. That it is the law of Kentucky, and was then, that where penalties are attempted to be enforced under a statute, and the statute is repealed pending the litigation, the penalties cease and no longer exist as an item of recovery. That if an act should attempt to carry them over, which was not done, it would be retroactive in its nature and void, and that the attempt here made to collect said taxes was a void proceeding, and established a misjoinder of actions, making it necessary

for state plaintiffs to revise their said petition in the State Court, if the Court had jurisdiction, dismissable on demurrer.

13. That the Act of April 30, 1936, and the Act of March 7, 1938, are both void and invalid as laws of Kentucky, authorizing the collection of said taxes, and as they were enforced by the defendant, James W. Martin, et al, such action constituted denial of due process of law, and a denial of the equal protection of the laws of the United States, and was repugnant to the 14th Amendment and to Amendments 4, 5, and 7 of the Constitution of the United States, in that the action of the said United States District Court was a denial of due process and a denial of the right of trial by jury on the issues propounded in the pleadings.

14. That the refusal of the United States District Court for the Eastern District of Kentucky, denying the filing of pleadings and denying the docketing of the cause, and refusing to make findings, and refusing to adopt the findings filed by your petitioners, was a denial of due process and of the equal protection of the laws of the United States, and in its refusal to follow the decisions of the highest court, the Court of Appeals, of the State of Kentucky, in respect to the said taxes attempted to be collected, and in respect to the enforcement of the note and mortgage of your petitioners, amounted to denial of due process, and was repugnant to the decisions of the Supreme Court of the United States, and the statutes made and provided for jury trial in Courts of Law.

15. That the refusal of said court, the United States District Court, to try the damage action for seizure and destruction of the said business, precipitated by your petitioners in their original and amended petition, was also a denial of due process and the equal protection of the laws of the United States. That your petitioners demanded a trial by jury, and never waived the same, and furthermore, on the ruling of the court, presented their notice of appeal to the Circuit Court of Appeals, which notice the said United States District Court refused to file, and the application made to the Sixth Circuit Court of Appeals to allow said appeal, which was denied, and the petition for mandamus which was made to the Sixth Circuit Court of Appeals to require the United States District Court to docket and try said cause, which mandamus was denied, was also a constitutional denial to petitioners.

In all of these respects the United States Circuit Court of Appeals for the Sixth Circuit, and the United States District Court for the Eastern District of Kentucky, constitute, and is a denial of due process and the equal protection of the law; and also a refusal on the part of the Circuit Court of Appeals to issue its mandate directed to the said United States District Court to docket and try said cause and accept the issues as made by the basic facts of the pleadings, and in its refusal to mandate said court to strike the pleas of counsel for the plaintiffs, J. W. Martin, and the Commonwealth of Kentucky, from the records of the court, and deny said pleas, they having been in default for more than six months in their pleadings, after the motion for judgment on April 11, 1938, made by your petitioners, and in the refusal of the said United States District

Court to render judgment for your petitioners, as by default, on their motion pro-confessed, the said Commonwealth of Kentucky and James W. Martin having disappeared under the laws of Kentucky as parties to this action and under the statutes of the United States, and the allegations of plaintiffs petition being undenied.

16. That under Section 773 of the Judicial Code of the United States, the common law issues are triable to the jury under the Seventh Amend of said Constitution, and when issues of fact in civil cases are to be tried, the right of trial by jury is sacred and secure and may not be waived unless the attorneys of record, by proper stipulation, file same with the clerk or by an oral stipulation made and entered in open court, and of record, which is filed. This is also the provision of the Code, in substance, of Kentucky. And furthermore, the Act of April 30, 1936, and 1938 provide that it shall be unlawful for any person to ship or transport, or cause to be shipped or transported into the State of Kentucky any distilled spirits from points without the State of Kentucky, and without first having obtained a permit from the State Tax Commission so that payment of such taxes and permit fees as are required by law have been paid in advance and shall accompany said shipment; and furthermore, said act provides:

> "Distilled spirits manufactured in Kentucky, purchased and shipped outside of the State of Kentucky, and then re-shipped into the State of Kentucky, is subject to the 5c per gallon import tax."

BRIEF

These provisions are contrary to the decisions of the courts of Kentucky, and are contrary to Section

8, Article 1, of the Constitution of the United States. THIS COURT AS NOW ORGANIZED VERY RECENTLY IN A NUMBER OF DECISIONS SUSTAIN OUR CONTENTION:

Here, April 16, 1938, the court reached its conclusion, not because the petition *was insufficient* but because the claimant, in respect to the injunction had an adequate remedy at law. This left all other issues pending, and nothing was adjudicated except the question of adequate remedy, and that remedy was in the United States District Court by trial according to the principles of the common law which obtained in the State of Kentucky, under the rule of Erie Railroad vs. Thompson.

Derees vs. Costagua. 254 U. S. 170.

"If the court, on the merits, has not considered valid service of process, then the judgment which is rendered is *without jurisdiction of the person,* such as can be reviewed by direct appeal to the Supreme Court of the United States. This principle was re-stated, and previous cases cited as late as Merriam & Co. vs. Sallfield, 241 U. S. 226."

"Whether the district court has acquired jurisdiction over the person of defendant may be reviewed by this court, and direct appeal under Section 238, Judicial Code. *A motion to dismiss is not a final judgment and cannot be res-judicata.* Hence, if the decree of September 11, . . . , was not final as between appellant and Sallfield, it cannot be res-judicata. The suit for injunction was an equitable proceeding. The *suit to foreclose a mortgage is a common law proceeding.* The court may have had jurisdiction of either cause of action and not jurisdiction, of the other. *A judgment rendered without service on the owner of the res is not a valid*

judgment. No lien can be obtained in rem against the assets sought to be reached within the district without service on the owner or bailee in control of the assets."

Wells Fargo Co. vs. Taylor, 254 U. S. 175.

In regard to this question of service in the above case, Wells Fargo vs. Taylor, 254 U. S. 175, the court said:

"The Federal Court may enjoin a party of collecting a judgment obtained in a state court where its enforcement would be contrary to recognized principles of equity. If the suit was one to stay proceedings in a state court by injunction, and this was denied, the court rightly entertained the suit and proceeded to an adjudication of the merits, for the citizenship of the parties and the amount in controversy were within the jurisdictional requirements."

Marshall vs. Holmes, 141 U. S. 589, and Ex Parte Simons, 208 U. S. 144.

"Under Section 265 an injunction will lie to restrain the judgment obtained by fraud and without service on the party. The Circuit Court protected jurisdiction and awarded the relief sought."

Simons vs. So. R. R. Co., 256 U. S. 115.

In Rogers vs. Hill, et al, 289 U. S. 588, the court said in respect to the mandate:

"The plaintiff, on adequate showing might file additional pleadings and expand the issue and take other proceedings. The mandate directed further proceedings in accordance with the decision. On the coming down of the mandate, the District Court vacated the temporary injunction and dismissed the Bill of Complaint on the

merits. Plaintiff appealed, the Circuit Court of Appeals affirmed, 62 Fed. (2) 1079, citing its opinion, and this court granted plaintiff's petition for a Writ of Certiorari. Defendants, renewing contention made in opposition to the petition for certiorari, assert that the appellate court on the frst appeal determined in favor of defendants all the issues presented by the complaint, and maintain that, no application for certiorari having been made within three months after that decision, the only question that this court now has power to decide, is whether the mandate directed dismissal.

We are of the opinion that the mandate did not direct dismissal. The granting of temporary injunction involved no determination of the merits. Such a decree will not be disturbed on appeal, for improvident allowance, violation of the rules of equity, or abuse of discretion."

National Fire Ins. Co. vs. Thompson, 281 U. S. 331, 338

Meccano Ltd. vs. John Wanamaker, 253 U. S., 136, 141

Smith vs. Vulcan Iron Works, 165 U. S. 518, 526.

"The opinion of the Circuit Court of Appeals did indeed deal with matters affecting the merits, but the decree did not extend beyond mere reversal of the order from which the appeal was taken. It directed that mandate issue in accordance with this decree. The mandate commanded proceedings in accordance with the decision. A direction for proceedings, in accordance with the opinion makes it a part of the mandate. Gulf Refining Co. vs. U. S., 269 U. S. 125, 126. Here the mandate was to proceed, not in accordance with the *opinion* but with the *decision*. These words, while often loosely used interchangeably, are not equivalents. The courts decision of a case is its judgment thereon. Its opinion is a statement of the reasons on which the judgment rests. Houston vs. Williams, 13

Cal. 24, 27. Adams vs. Yazoo & M. V. R. Co., 77 Miss. 194, 304; 24 So. 200, 317; 28 So. 596. Craig vs. Bennett, 158 Ind. 9, 13; 62 N. E. 273. Coffey vs. Gamble, 117 Iowa 545, 548; 91 N. W. 813. The Judicial Code uses 'decision' as the equivalent of 'judgment' and 'decree.' 128, 238. As a mandate in the words of the decree was unquestionably sufficient to give effect to the ruling of the appellate court 'decision' may not reasonably be held to have been used for 'opinion.'

Moreover, if the court intended to *direct dismissal,* it is to be presumed that it would have done so unequivocally and directly by means of language, form of decree, and mandate generally employed for that purpose. But, assuming it included the opinion, the mandate would not prevent the district court in the exercise of a sound discretion from allowing plaintiff, were adequate showing made, to file additional pleadings, vary or expand the issues and take other proceedings to enforce the accounting sought by his Bills of Complaint. Wells Fargo & Co. vs. Taylor, 254 U. S. 175, 82. Metropolitan Water Co. vs. Kaw Valley District, 223 U. S. 519, 523. Mutual Life Ins. Co. vs. Hill, 193 U. S. 551, 553. Smith vs. Adams, 130 U. S. 167, 177. In any view of the matter, it is clear that the decree of the appellate court was not final, and that plaintiff, in order to have the validity of the payments considered here, was not *bound within three months* after entry to petition this court for a writ of certiorari."

Sprague vs. Ticonick Bag Co., 307 U. S. 166:

"As between solicitor and client, such allowance are appropriate only in exceptional cases, and for dominating reasons of justice, but here we are concerned solely with the power to entertain a petition. The district court deemed itself powerless because foreclosed by the mandate. It could not consider the questions which the mandate laid at rest. While the mandate is con-

trolling as to matters within its compass, on the remand the lower court is free, as to other issues."

In Re. Sanford Fork & Tool Co., 160 U. S. 247

Ex-Parte Century Indemnity Co., 305 U. S. 354.

"Certainly the claim as between solicitor and client-costs was not directly in issue in the original proceedings. It was neither before the Circuit Court of Appeals nor before this court. Its disposition, therefore, by the mandate of either court, would be implied only if the claim for such costs was necessarily implied in re-claim in the original suit, and its failure to ask for such costs, and impliedly covered by the litigation. The taxable costs we hold was not impliedly covered by the original decree and by mandates, and that neither constituted a bar to the disposal of the petition below on its merits. The decision of the Circuit Court of Appeals must fall, and must be reversed, so that the district court may entertain petition for reimbursement in the light of the appropriate equitable considerations. The expiration of a term of court in no way affects the petition of the district court to make any act or to take any proceeding in any civil action which has been pending before it. Lacking jurisdiction to review the merits on the appeal, taken under section 3 of the act of August 24, 1937, this court vacates the decree below and remands the case to the district court for further proceedings to be taken independently of that section."

Jameson vs. Morganthau, 307 U. S. 171.

Sec. 57 Judicial Code-Title 28. provides for proceeding under lien in U. S. Court. Trustee must be made party. Sec. 238 Judicial Code provides for appeal where no proper service is had. Central Distributing Co., Inc., was not served nor was J. W. Kohn, et al, in attachment suit, nor was Harry Bayer, Trustee, so we have

the ground for Writ here, because there can be no appeal where there is no jurisdiction of party, and here there was neither, as petitioner alleges; so the Kentucky Code section 24 provides the party in interest MUST be made a party. Equity issues must be disposed of first.

Union Pac. R. R. vs. Syas, 246 F. 561-6.

"A single taxpayer even tho' a non-resident may bring a suit on behalf of himself and all others similarly interested, amounting to a large number of persons to receive back money illegally exacted for taxes."

Orear case—23 Law Reporter (1912)

Com. vs. Scott—80 Kentucky 498

112 Kentucky—252 Com. vs. Wiggins

92 Kentucky—48 Oswald vs. Morris

Comsrs. vs. Weiss—269 Kentucky—554

Blair and Carlisle vs. Turnpike Co. 157 Kentucky (also 4th Bush).

Fordson Coal Company case—249 Kentucky —498 7 Fed - (2) 117

Burchett vs. Clarke—109 S. W. 888 (Kentucky)

90 ~~198~~ Kentucky—~~589~~ 556 - Randolph vs. Lampkin

La Pointe vs. O'Malley—2 N. W.—632

Murphy vs. O'Reilly—263 Kentucky.

25 Ky. Code - Whaley vs. Com. 615.W.35

17. Your petitioners join in the petition of the Central Distributing Co., Inc. and make its said petition a part of this petition, supplemental to the issues arising on this petition, and the exhibits attached to its said petition for Certiorari, they also make exhibits to this petition and a part of this petition.

Wherefore, they pray that a writ of Certiorari be issued to the Honorable Sixth Circuit Court of Appeals, and to the Honorable Xen Hicks, its presid-

ing judge, and to the honorable Mac Swinford, Judge of the United States District Court for the Eastern District of Kentucky, by and through the said Sixth Circuit Court of Appeals, on orders from this court, and that the decree entered on April 16, 1938, in the city of Louisville, be vacated and set aside, and that the order of the said Honorable Mac Swinford, made in Chambers, on the 27th day of February, 1940, be vacated and set aside, and that the mandate of this court, entered at the October Term of 1939, be modified, and a direct order issue to the United States District Court for the Eastern District of Kentucky, so that the merits of this cause may be tried, as provided by law, and that to a jury, there be submitted all controversive issues of fact for proof; otherwise, that the United States District Court be required to enter judgment thereon, and that the action proceed ex-parte in respect to James W. Martin and the Commonwealth of Kentucky, and that they be adjudged in default after twenty days from when this action was filed in the United States District Court for the Eastern District of Kentucky, March 16, 1938. All of which is respectfully submitted.

HARVEY H. SMITH

Attorney for Plaintiffs,
Covington, Kentucky
and Cincinnati, Ohio.

Geo S Whiteman

AFFIDAVIT

STATE OF KENTUCKY
COUNTY OF CAMPBELL SCT.

Harry Bayer deposes on oath and says that he has read the foregoing petition for a Writ of Certior-

ari, and that the facts alleged and contained therein are true to the best of his information and belief and that he is the Trustee above referred to and representative of the Plaintiffs-Petitioners.

HARRY BAYER.

Subscribed and sworn to before me this 22nd day of May, 1940.

Elsie M. Dewald, *Notary Public.*

My commission expires 10-29-40.

NOTE: (We respectfully add that this petition be consolidated with that of the Central Distributing Co., Inc., filed this day for the same purpose in the same cause, and be considered with their application for the Writ of Certiorari).